



## **A Failure of Leadership: DADP, Proposition 36, and the Statewide Advisory Group**

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to the Little Hoover Commission

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As I write, the future of Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, is in jeopardy. Despite three years' worth of efforts to improve Prop. 36, neither law enforcement nor treatment have secured their sought-after revisions, a package of mostly helpful amendments has stalled in court, and legislators are cutting Prop. 36 budgets, even as the law continues to save the state hundreds of millions of dollars.

This political and legal stalemate was avoidable. As my testimony sets forth, the failure of the Department of Alcohol and Drug Programs to exercise leadership is chiefly responsible for the current state of affairs. If DADP continues to shirk its duties, then the state agency charged with implementing and overseeing Prop. 36 will be the cause of its demise.

### **Early Days of the Statewide Advisory Group**

As Prop. 36 neared its official start date of July 1, 2001, the state Department of Alcohol and Drug Programs convened a working group of stakeholders to guide the implementation of the new, voter-approved law.

As the campaign manager for Prop. 36, I was honored to be invited to join the panel, called the Statewide Advisory Group (SAG), to represent the proponents of the initiative and to explain our goals and meaning as various issues came to light.

The initial meetings were astonishing. People from diverse fields, law enforcement and treatment, local and state government, research and advocacy, sat together and formed subcommittees to quickly hammer out the state's course for making Prop. 36 work. The

spirit was genuinely cooperative, the atmosphere noncombative, the work both expeditious and serious.

Before the implementation deadline, SAG had provided detailed guidance on a huge range of Prop. 36 questions. No doubt, the extraordinary collaboration of those early months helped to successfully launch Prop. 36.

Just 10 days after Prop. 36 had taken effect, SAG reconvened. We congratulated ourselves, and DADP decided to convert the group from a short-term problem-solving panel to a longer-term advisory council. At the time, that decision made sense, as the collaboration was sincere and there was a shared sense of mission.

In retrospect, SAG's mission was fundamentally altered after July 2001 in ways that did not advance the interests of Prop. 36 or treatment generally.

Over the next five years, DADP stopped seeking advice or guidance from SAG, which continued to meet quarterly. Though SAG members received Prop. 36 news before anyone else, SAG meetings increasingly became one-way group communications, in which DADP informed us of decisions that had already been made.

### **The Realignment Controversy**

The wholesale devaluation of SAG became clear in January 2003. Just 18 months after Prop. 36 took effect, Governor Gray Davis proposed ending state funding for Prop. 36, and transferring responsibility from the state to the local level. This was an unconstitutional structural change; the proposal purported to override the voters' designation of Prop. 36 as a state program and their appropriation of five years of continuous funding. "Realignment" of Prop. 36 would have badly disrupted implementation of the law at the local level, increasing disparities in treatment between counties. While eliminating \$120 million per year in state funding, it also would have eliminated state oversight, budgetary auditing and evaluation of local programs.

The realignment proposal did not come from SAG, nor was SAG informed of the governor's intentions to reform Prop. 36. Indeed, DADP failed to explain the merits of realignment to SAG. There were no SAG meetings between December 2002, before the realignment proposal was announced, and late March 2003, *10 weeks after* the budget

proposal was unveiled. It was plain that, in DADP's view, SAG's advice or response to "realignment" was irrelevant.

Outside the confines of DADP, the SAG panel was unable or unwilling to organize a response to realignment, even though it was seen by many as a mortal threat to the new, voter-approved program that the group was charged with overseeing. The realignment controversy exposed just how little regard DADP had for the advisory group it had created. Our failure to assert leadership on the controversy further demonstrated our weakness in the face of DADP and the governor. (For many reasons unrelated to SAG, realignment did not occur.)

Gradually SAG devolved into little more than a privileged-access debating society. I continued to participate on behalf of the proponents of the original initiative, in part because DADP did provide some useful information to the group, and in part to monitor what other members of SAG were thinking and planning. I always made the proponents' positions on current issues clear to the panel. But by 2004, DADP stopped recording my comments in the official minutes of the meetings, confirming that the proponents' voice was of marginal importance to the implementation of Prop. 36.

### **The Reform and Re-funding Working Group**

In January 2005, a working group made up almost entirely of SAG members was formed to help guide the "reform and re-funding" of Prop. 36. In order to avoid chairing a group charged with crafting legislation, DADP took a back seat, while a sitting judge, Stephen Manley, and a county employee, Sacramento County's Toni Moore, ran the group in its stead.

This working group was first convened as a *consensus group* that would identify noncontroversial reforms to Prop. 36 to be considered for legislation. The goal was to develop a bill that would make a series of tweaks to the initiative that might show legislators that responsible reforms could be made. This reform effort, in turn, was intended to inspire the legislature to appropriate money for Prop. 36 when funding ran out in mid-2006.

Representing the proponents, I was invited to participate in the consensus group alongside representatives of district attorneys, police chiefs, narcotics officers, probation

officers, judges, public defenders, county administrators, addiction doctors and treatment providers. Needless to say, this was an unusually broad group.

There was one rule announced early on (this being a consensus group): *only items with the full support of every member* of the panel would go into the group's final product. These terms were frequently emphasized by the co-chairs. Everyone on the group would have authority to bring forth proposals, and everyone would have a "veto." Nothing that was controversial would move ahead. Complete consensus was absolutely essential in order to develop reforms that would garner widespread legislative support.

While the makeup of the working group did not look promising for achieving broad consensus, for a few months the group did good work and did agree on a number of issues. The one-veto rule was taken seriously; many proposals were offered and rejected by the veto of just one member. With this process, in the first part of 2005, a detailed bill was drafted with everyone still at the table.

### **Jail Sanctions Break Up the 'Consensus'**

Throughout the working group's deliberations, jail sanctions emerged as the elephant in the room. Everyone understood that Prop. 36, as written and approved, precluded the use of jail sanctions to punish relapse and other violations during treatment. The addiction-medicine doctors (represented by the California Society of Addiction Medicine [CSAM]) agreed that jail sanctions were inappropriate for Prop. 36. The proponents and physicians would therefore veto any proposal to put jail sanctions into the consensus product.

Still, there was much discussion of the issue. The proponents were lobbied to accept jail sanctions in furtherance of a higher purpose – namely, continued funding. Arguments were made on both sides as to the efficacy of jail sanctions in actually helping treatment clients to succeed.

Our position was that jail sanctions were a non-starter for legal reasons, because the state constitution, by Article II, prohibited any amendment to the voter approved initiative, except according to rules set forth within the initiative itself. Furthermore, amendments to Prop. 36 must be consistent with the initiative and in furtherance of its purposes, and require a 2/3 vote of the legislature. In light of the plain language of Prop. 36 barring jail sanctions, and its mandate for treatment *instead of* incarceration, it would be impossible to add jail sanctions to the program through legislative means.

We stated this first as a matter of opinion, then arranged for an independent legal analysis of the issue by a prestigious law firm (Altshuler Berzon in San Francisco), and shared the resulting opinion letter with the consensus group. The law firm's legal analysis accorded with our position. Finally, we helped draft and submit questions to the Office of Legislative Counsel to address the constitutional questions.

A Leg. Counsel opinion was issued on April 18, 2005. It clearly stated that jail sanctions could *not* be added to Prop. 36 due to the constitutional restrictions in Article II and the terms of Prop. 36:

Legislation that would authorize a sentence of incarceration for a first, second or third drug-related probation violation, if enacted, would constitute an amendment of Proposition 36 that would not both further that initiative statute and be consistent with its purposes. Therefore, the legislation could not take effect without voter approval pursuant to subdivision (c) of Section 10 of Article II of the California Constitution.

Upon first seeing the Leg. Counsel opinion, frankly, I was relieved. I believed (naively) that it would end the increasingly tense debate and the growing stagnation of the consensus group. We could move on to other issues and finish the consensus legislation.

But that is not what happened. In fact, quite the opposite occurred.

At the next meeting of the consensus group, in late April, Judge Manley insisted on the inclusion of language adding jail sanctions to Prop. 36 in the panel's working document. Law enforcement lobbyist John Lovell was insistent as well. In spite of evidence to the contrary, even the public defenders, represented by Barry Melton, were convinced that adding jail sanctions would be good politics – getting law enforcement support for continued funding of Prop. 36 programs.

And so, the surprising response of the consensus group to the unambiguous warning by Leg. Counsel was not to *drop* jail sanctions, but to *escalate* efforts to include jail sanctions in the final product.

At this point in the process, the proponents and the doctors from CSAM exercised our vetoes. Too late. Apparently, by then, the rule that the consensus group was built upon had been changed. Manley, Lovell and the administration had *enough* consensus for a package of reforms that would include jail sanctions. The group's founding agreement to

push only items with *complete* consensus was amended, unilaterally, by Judge Manley as the chair of the panel. The vetoes of the addiction-medicine doctors and the initiative proponents were not respected, and we were forced to formally quit the consensus group. When we did, Judge Manley and his allies accused us of abandoning the effort and opposing all meaningful reforms.

In the Spring of 2005, the group's final product, which included several useful, noncontroversial reforms, as well as jail sanctions and some other objectionable material, became SB 803 (Ducheny). It was passed by the Senate soon after. In August 2005, the bill stalled in the Assembly. The package was eventually passed the next year as a budget trailer bill, SB 1137, at which point CSAM and the proponents filed suit. The court found in our favor and blocked the bill's enforcement, due to the inclusion of the unconstitutional jail sanctions. No part of the bill has ever gone into effect, and many worthwhile reforms have been held up.

### **DADP's Failure in the SB 803 / SB 1137 Controversy**

The failure of the consensus group rests not only with Judge Manley's unilateral altering of agreed-upon ground rules, but also with his silent partner, DADP. (Judge Manley remains DADP's go-to guy on all Prop. 36 matters, playing a role almost like father to the program – a role that I find strange and ironic, given that he led the opposition to the initiative in 2000.)

In its March 2003 report, the Little Hoover Commission recommended that DADP “establish a council to develop a unified strategy to cost-effectively reduce the expense, injury and misery of alcohol and drug abuse [... and] involve prevention, treatment, and law enforcement leaders.”<sup>1</sup> In this case, rather than include and respect these diverse perspectives, DADP subverted a consensus process, pursuing politics over policy. Governor Schwarzenegger's long-running role in the process became clear to me when he formally adopted the group's work product as his own proposal, specifically calling for passage of SB 803 in his FY 2006-07 budget.

However, DADP and the governor were thwarted. DADP's intense involvement with the working group's process led it to be derelict in its duty to inform the others in the administration, as well as legislative allies, of the grave constitutional risks of putting jail

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<sup>1</sup> Little Hoover Commission, “For Our Health & Safety: Joining Forces to Defeat Addiction,” March 2003.

sanctions into Prop. 36. Like other advocates for jail sanctions, DADP officials appeared eager to ignore the formal legal opinion of the Legislative Counsel and risk a lawsuit.

A more level-headed analysis would have predicted the court's inevitable injunction in July 2006. If DADP and the administration so badly needed the support of law enforcement groups, summer 2005 was the time to work out alternatives to jail, alternatives that could have been included legally in Prop. 36. Instead of providing such leadership, however, DADP steamrolled over the inconvenient voices of two experts and prepared the path for the current political, legal and funding debacle.

The result is that law enforcement has gotten nothing, treatment has gotten nothing, a package of mostly helpful reforms is stalled in court, and legislators are now cutting Prop. 36 budgets, no doubt partly because they feel anger at having their efforts to reform the program rebuffed by the courts.

### **The SAG is Disbanded**

On July 28, 2006, just two weeks after a judge prevented SB 1137 from taking effect, the SAG met for the last time in Sacramento.

Then-DADP director Jett congratulated the group for five years of work, calling the SAG "one of the most steady advisory groups" working with the agency. A lot had been done in those five years, she said, but "the next few months are critical." Then Jett said it was time for the group to be "minimized." Its role would shift from one of watching implementation to more "programmatic" concerns. And with that, she pulled the plug on the SAG. Six months later, Jett moved to the Department of Corrections and Rehabilitation.

Under the new DADP director, a successor group of sorts, the "Offender Treatment Advisory Group," now meets occasionally, with the limited mandate of monitoring that supplemental program's progress. The group consists of precisely the same roster of members as the SAG, minus two groups – proponents (my seat) and the addiction medicine physicians (CSAM) – that successfully sued to block SB 1137. Were this group to be given any real role, the lack of dissenting voices would certainly be a limit on its ability to generate useful advice.